No. 21456

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE

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I N D E X

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INTEREST OF AMICUS

George F. Duke, Richard B. Collins, Jr., and
e J. Sclar are attorneys with California Indian Legal
rvices (formerly the Indian Services Division of Calif-
nia Rural Legal Assistance), a non-profit corporation
ndering free legal assistance to indigent California

ndians. The decision in this case will be of significance
many California Indians. Leave to file as amicus curiae
as granted by an order of the court dated July 29, 1968.

ISSUES PRESENTED

1. Do 25 U.S.C. §345 and 28 U.S.C. §1353 give a
ederal district court jurisdiction over an Indian's suit
obtain an allotment?

2. Does the Taylor Grazing Act or withdrawals,
eservations, and classifications made pursuant to that act
mit an Indian's choice of an allotment under 25 U.S.C.
34?

3. Can the Interior Department rule that 160
res of uncultivatable land is unsuitable for an Indian
lotment when the Department finds that an Indian family
uld not support itself by grazing livestock on the land
t does not find that the Indian family could not support
self by other agricultural pursuits upon the land?

4. Is "unsuitable for an Indian allotment" a
oper land classification under the Taylor Grazing Act?

5. Is land appropriated within the meaning of
U.S.C. §334 when it is listed for sale pursuant to the
olated Tract Act (43 U.S.C. 1171)?

6. Are seven appellants who failed to pursue
dministrative appeals nevertheless entitled to judicial
view of the Interior Department's decisions, when adminis-
ative appeals could have caused irreparable harm and an

nterior Department regulation, whose legality the
ppellants challenge, would have rendered the appeals futile?

STATEMENT OF CASE

Appellants, 33 Indians, are appealing from
mmary judgments rendered by the United States District
ourt for the Central District of California (Jesse W. Curtis,
dge) in favor of appellees, United States of America and
ewart Udall as Secretary of the Interior, and denying the
dians' claims for allotments under 25 U.S.C. §334.

Each Indian initially filed an application for a
0 acre Indian allotment with the Riverside Land Office,
reau of Land Management (BLM), Department of the Interior.
e applications indicated on their face that they were made
rsuant to Section 4 of the General Allotment Act of 1887,
U.S.C. §334. Accompanying each application was a
rtificate of eligibility for an allotment issued by the
reau of Indian Affairs. Each application was also
companied by a petition for classification because the
plication form required a classification petition if, as
s the case for every Indian, the application sought land
thdrawn from settlement and reserved for classification by
ecutive Order No. 6910. (See Application for an Indian
lotment, question 10.)

The BLM rejected seven of the applications (R-06410
rough R-6416) on the basis that the lands sought had been
dered into the market for sale at public auction under the

solated Tract Act, 43 U.S.C. §1171, very shortly before the pplications were filed. Based on BLM field examinations, he other twenty-six applications were each rejected on the round that the applicant could not support an Indian family y grazing livestock on the sought after parcel.[1] Some ecisions also stated that the land was unsuited for raising rops. All twenty-six decisions "classified" the land as nsuitable for Indian allotments.

Unsuccessful administrative appeals were taken by he twenty-six Indians whose applications had been rejected n the ground of unsuitable land. In one case (R-05789) the ndian stated in his appeal that he would use the land to aise barnyard animals, but the BLM rejected that use as not roper for a 160 acre allotment. The other seven Indians did ot pursue administrative appeals.

The thirty-three Indians then filed a suit to btain allotments of the lands for which they had applied and o prevent the Government from taking any action that would ake allotment impossible. Jurisdiction was asserted under 5 U.S.C. §345 and 28 U.S.C. §1353. In granting summary

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. The Government's opening brief states that applications -06410 through R-06416 were also rejected because the parcels nvolved were unsuited for Indian allotments. (Pp. 6-7.) The dministrative record available to us contains no field reports n those lands, and the trial court's findings of fact show he marketing orders under the Isolated Tract Act as the only asis for denying the applications (R. 77).

udgment against the Indians, the trial court held that it ad no jurisdiction to review the Interior Department's ecisions because the granting of allotments was committed the Department's discretion. The court based its conusion solely on the Administrative Procedure Act (5 U.S.C. 01-706 [formerly 5 U.S.C. §1009]) and made no reference to U.S.C. §345 or 28 U.S.C. §1353. The court also concluded at it lacked jurisdiction to review the cases of the seven dians who had not exhausted their administrative remedies. nally, the court decided that the other twenty-six ministrative decisions were not arbitrary, capricious, or de in bad faith. (R. 77-78.)

ARGUMENT

I. 25 U.S.C. §345 AND 28 U.S.C. §1353 GIVE A FEDERAL DISTRICT COURT JURISDICTION OVER AN INDIAN'S SUIT TO OBTAIN AN ALLOTMENT.

Both 25 U.S.C. §345 and 28 U.S.C. §1353 expressly ovide for federal district court jurisdiction of an dian's action to obtain an allotment, and the case law tablishes that those statutes mean what they say. Arenas United States, 322 U.S. 419, 430-432, 88 L.Ed. 1363, 71-1372 (1944); Morrison v. Work, 266 U.S. 481, 490, 69 Ed. 394, 399 (1925); United States v. Payne, 264 U.S. 446, 7, 68 L.Ed. 782, 783 (1924); Prarie Band of Pottawatomie ibe of Indians v. Puckee, 321 F.2d 767, 770 (10th Cir. 63); United States v. Eastman, 118 F.2d 421, 423 (9th Cir. 41); Leecy v. United States, 190 Fed. 289, 293 (8th Cir. 1911),

ppeal dismissed 232 U.S. 731, 58 L.Ed. 818; Sloan v. United tates, 118 Fed. 283, 285 (C.C. Neb. 1902), appeal dismissed 93 U.S. 614, 48 L.Ed. 814; Sloan v. United States, 95 Fed. 93, 195 (C.C. Neb. 1899); see also United States v. Pierce, 35 F.2d 885, 888-889 (9th Cir. 1956)). As the courts have lso recognized, 25 U.S.C. §345 authorizes suit against the nited States for an allotment (Morrison v. Work, supra; nited States v. Payne, supra; Harkins v. United States, 75 F.2d 239, 241 (10th Cir. 1967); Gerard v. United States, 67 F.2d 951, 954 (9th Cir. 1948)) and 25 U.S.C. §345 and 8 U.S.C. §1353 empower district courts to grant allotments o Indians (Sloan v. United States, 95 Fed. 193, 195, supra).

Obviously, 25 U.S.C. §345 and 28 U.S.C. §1353 are xceptions to the general rule that courts may not reassess eterminations committed by law to agency discretion. As was aid in Sloan v. United States, supra, 118 Fed. 283, 290:

> "Counsel for the government strongly contend that the court is practically bound to follow the rulings and decisions of the department of the interior in these cases, upon two grounds: First, that the construction given by the department charged with the duty of supervising the affairs of the Indians to the statutes and treaties dealing therewith are entitled to great weight, and in doubtful cases should control the judgment of the court; and, second, that the rights of the claimants present cases of mixed questions of law and fact, which prevents the court from considering the same under the recognized rule that courts will not re-examine questions of fact decided by the department in the disposition of the lands placed in its charge, but are limited to a consideration only of questions of law. When congress adopted the act of August 15, 1894, and amended it by the act of February 6, 1901, conferring upon the circuit courts of the United States jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or

> treaty,' and further provided that any one in whole or in part of Indian blood or descent, who claimed 'to have been unlawfully denied or excluded from any allotment or parcel of land,' might bring suit in the proper circuit court for the enforcement of his rights, it certainly must have been the legislative intent to confer upon the courts full authority and right to hear and determine every question arising in any suit brought by a claimant to an allotment. These acts were adopted by congress because it was brought to its attention that many persons, claiming allotments, had been denied that right by the department, and it was sought to make provision for a method whereby such persons could reassert their claims before a judicial tribunal. The real purpose of the acts conferring jurisdiction upon the courts in this class of cases would be practically nullified if the contention of counsel should be sustained to the effect that in all cases wherein the department had ruled against the claimant the courts are bound to follow the decision of the department. The remedial intent of the legislation in question must be given fair and full force, and this imposes upon the court the duty of hearing and deciding all questions of law and fact necessary to the full consideration and determination of the rights of the several claimants."

aus United States v. Payne, supra, establishes that a court ay redetermine whether particular land is suitable for allot-ent.

Furthermore, even under the Administrative rocedure Act a court may reverse an administrative decision ommitted by law to agency discretion if the decision was endered pursuant to a legally erroneous interpretation of ne governing law. (Richardson v. Udall, 253 F.Supp. 72, 79 -966).)

II. NEITHER THE TAYLOR GRAZING ACT NOR WITHDRAWALS, RESERVATIONS, AND CLASSIFICATIONS MADE PURSUANT TO THAT ACT LIMIT AN INDIAN'S CHOICE OF AN ALLOTMENT UNDER 25 U.S.C. 334.

In 1887 Congress passed and the President signed he General Allotment Act. Section 1 of the act provided hat each reservation Indian would be granted restricted itle to a parcel of reservation land that the President onsidered suitable for agricultural or grazing pursuits. ection 4 of the act, now 25 U.S.C. §334, provided then as ow that where a non-reservation Indian settles upon unppropriated Government lands, the Indian is entitled to have he land allotted to him "in quantities and manner" as proided in Section 1 of the act. As the result of several mendments concerning the effect of age and marriage on the uantity of allotted land, Section 1, now 25 U.S.C. §331, eads in relevant part:

> "[T]he President shall...whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such [reservation] Indians...cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one-hundred and sixty acres of grazing land to any one Indian."

ection 331 also provides that an Indian can obtain only orty acres of agricultural land if the land may be brought ithin an irrigation project.

The Taylor Grazing Act, 43 U.S.C. §315-315n (48 tat. 1269 as amended), was enacted in 1934. Though pronouncing itself as a law "to promote the highest use of the ublic lands," (43 U.S.C. §315) "the whole purpose of the ill" was to aid the livestock industry. (H.R. Rep. No. 903, 3d Cong.,2d Sess. 2 (1934); S. Rep. No. 1182, 73d Cong., 2d ess. 2 (1934)). The law authorized the Interior Department

o create grazing districts out of up to 80,000,000 acres of acant, unappropriated, and unreserved public domain 43 U.S.C. §315), subject to a right of homestead entry on ands more valuable for the production of agricultural crops han native grasses and forage plants. (Act of June 28, 934, c.865, §7, 48 Stat. 1272.) Then the President, acting ursuant to 36 Stat. 847 as amended by 37 Stat. 497, issued xecutive Orders 6910 and 6964. Those executive orders temporarily" withdrew from settlement all of the un- ppropriated and unreserved public domain and reserved it ending classification. Congress responded by increasing o 142,000,000 the acreage includable within grazing istricts and by the amending Section 7 of the act (43 U.S.C. 315f) to read in relevant part:

> "The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry....Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such

application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided...."

Interior Department regulations provide (43 C.F.R. 212.0-3(b)) and the Government maintains that an Indian annot obtain an allotment until the land sought is classified ursuant to the Taylor Grazing Act as proper for disposal nder the General Allotment Act. Several factors suggest hat this position is wrong and should be rejected by the ourt.

First, although the Taylor Grazing Act proscribes ll settlement and disposal of public lands in the absence f a classification opening the lands to entry, Indian llotments could be excluded from the act's operation if ongress did not intend allotment to be so restricted. Wood Manufacturers Association v. NLRB, 386 U.S. 612, 619 8 L.Ed.2d 357, 363-364 (1967); NLRB v. Fruit & Vegetable ackers, 377 U.S. 58, 72, 12 L.Ed2d 129, 138 (1964); Holy rinity Church v. United States, 143 U.S. 457, 459, 36 L.Ed 226, 28 (1892).) While the act's legislative history (H.R. Rep. o. 903, 73d Cong., 2d Sess. (1934); S. Rep. No. 1182, 73d ong. 2d Sess. (1934); H.R. Rep. No. 2050, 73d Cong., 2d ess. (1934); Hearings on H.R. 2835 and H.R. 6462 before he House Committee on the Public Lands, 73d Cong., 1st & 2d ess. (1933-1934); Hearings on H.R. 6462 before the Senate ommittee on Public Lands and Surveys, 73d Cong., 2d Sess. 1934); 78 Cong. Rec. 167, 3310, 4224, 6344-6346, 6346-6374, 379, 6414, 9607, 11139, 11147, 11161, 11162, 11419, 11634,

1658, 11745, 11778, 12004, 12167, 12168, 12367, 12576, 12578, 2455 (1934); H.R. Rep. No. 2125, 74th Cong., 2d Sess. 1936); S. Rep. No. 2371, 74th Cong., 2d Sess. (1936); earings on S. 2539 before the Senate Committee on Public ands and Surveys, 74th Cong., 1st Sess. (1935); 80 Cong. Rec. 85, 3201, 3815, 3816, 3855, 9316, 9848, 10149, 10478-10480, 0624-10626, 10549, 10696, 10894, 10896 (1936)) shows a onscious limiting of homesteading (House Hearings on H.R. 835 at 22, 23, 103, 189, 200, 201; Senate Hearings on .R. 6462 at 36, 65, 66, 86, 88, 92, 126, 178, 196; enate Hearings on S. 2539 at 51, 72) and veterans' claims House Hearings on H.R. 2835 at 92, 103, 109), the legisla- ive history reveals no intent to restrict Indian allotment. either Congressional ignorance nor the relative insigni- icance of Indian allotments explains this fact, because the nterior Department's management of grazing on Indian llotments was discussed at some length. (House Hearings on .R. 2835 at 156-160.)

Second, superimposing the Taylor Grazing Act n the General Allotment Act would repeal part of the latter aw. The Allotment Act contemplates 160 acre allotments f land suitable for grazing livestock. The Taylor Grazing ct, however, prohibits the Secretary of the Interior from lassifying land as available for a grazing allotment, ecause if the land's "highest use" (43 U.S.C. §315) is for razing, it must be retained on the public range, and if the and is most valuable for something other than grazing, it ust be classified for that use and not as available for an

ndian allotment to be used for grazing. Thus, one type f allotment, i.e., for grazing, would be legally impossible to obtain as is indicated by the Interior Department regulations which permit lands to be classified for llotment only if they are suitable for the growing of ultivated crops (43 C.F.R. §§2410.1-3(d)(6), 2410.0-5(d)). he presumption is against such a sub silentio repeal. United States v. Zacks, 375 U.S. 59, 11 L.Ed.2d 128 (1963); ilver v. New York Stock Exchange, 373 U.S. 341, 10 L.Ed.2d, 89 (1936); United States v. Borden Co., 308 U.S. 188, 198, 4 L.Ed. 181, 190 (1939).)

Only two reported cases have considered the elation between the General Allotment Act and the Taylor razing Act. Finch v. United States, 387 F.2d 13 (10th Cir. 967) did not consider the arguments made above. The 10th ircuit's reliance on 25 U.S.C. §336, Id. at 15, was misplaced. ection 336 did not amend section 334. (Cf. Jones v. Alfred . Mayer Co., ___U.S.___, 20 L.Ed.2d 1189, 1194, fn. 20 1968); United States v. Hemmer, 241 U.S. 379, 385 (1916); elex v. Yaksum, 163 Pac. 481, 485 (Wash. 1917).) Daniels v. nited States, 247 F.Supp. 193 (W.D. Okla. 1965) simply ssumed that classification pursuant to the Taylor Grazing ct was a prerequisite to allotment. In view of the rule hat Congressional legislation must be construed in the way ost favorable to Indians (Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 63 L.Ed. 138, 141 (1918); Choate v. Trapp, 224 U.S. 665, 675, 56 L.Ed. 941, 946 (1912); United States v. Celestine, 215 U.S. 278, 290, 54 L.Ed. 195, 199

1909); Arenas v. Preston, 181 F.2d 62, 66 (9th Cir. 1950), ert. denied 340 U.S. 819, 95 L.Ed. 602; Elser v. Gill et Number One, 246 Cal.App.2d 30, 36 (1966)) and in view of he factors not considered in Finch and Daniels, the court hould hold that neither the Taylor Grazing Act nor with-rawals, reservations, and classifications made pursuant to hat act limit an Indian's choice of an allotment under 5 U.S.C. §334.[2]

III. THE INTERIOR DEPARTMENT CANNOT RULE THAT 160 ACRES OF UNCULTIVATABLE LAND IS UNSUITABLE FOR AN INDIAN ALLOTMENT WHEN THE DEPARTMENT FINDS THAT AN INDIAN FAMILY COULD NOT SUPPORT ITSELF BY GRAZING LIVESTOCK ON THE LAND BUT DOES NOT FIND THAT THE INDIAN FAMILY COULD NOT SUPPORT ITSELF BY OTHER AGRICULTURAL PURSUITS UPON THE LAND.

In 25 of the cases presented in this appeal the overnment disallowed the applications on the ground that the nd lacked the native plants for a cattle or sheep grazing anch capable of supporting an Indian family.[3] No considera-ion was given to raising stock by purchased feed. In one ase (R-05789) the Interior Department considered the raising barnyard animals, but rejected the idea because sufficient ood could not be grown on the land and because such a use

[2] Holding that the Taylor Grazing Act does not restrict n Indian's choice of an allotment will not allow Indians to elect allotments in national parks, national monuments or ational forests. The Taylor Grazing Act does not control ettlement in national parks, monuments, or forests (43 U.S.C. 315), and Indian allotments in national forests are expressly

vas inconsistent with a 160 Acre allotment.[4] Those decisions represent an unreasonably restrictive reading of the general Allotment Act.

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5. The Interior Department also takes the position that a single allotment must support an entire family. (John E. Palmer, supra, 71 I.D. 66, 67-68 (1964).) If several members of the same immediate family (husband, wife, children, and other relatives who are part of the household) seek contiguous allotments, the proper standard would seem to be whether the combined land of the contiguous allotments would support the family.

6. The Government also claims that the Indians did not fully comply with Section 334 because they selected "appropriated" lands and did not settle upon the lands prior to selection. (Appellees Brief at 19).

The Government asserts that the lands were appropriated because they were withdrawn from settlement pending classification under the Taylor Grazing Act. Such an argument is meaningless. If the Taylor Grazing Act amended the Allotment Act, the withdrawn lands would not be available for allotment, unless classified for allotment, whatever the meaning of "appropriated." If, on the other hand, the Taylor Grazing Act was not intended to modify an Indian's rights under the General Allotment Act, withdrawal under the Taylor Grazing Act would not constitute an appropriation as that term is used in the Allotment Act. (continued on page 15)

The General Allotment Act had many objectives. oremost among them were making the Indians self reliant and nding their nomadic wanderings, tribal relationships, and

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The Government's settlement argument is similarly without erit. Finch v. United States, supra, 387 F.2d 13, 16, ecognized that if the Taylor Grazing Act governs the ranting of allotments, an Indian would have to violate the aw to settle on a parcel of land before it was allotted to im. Finch therefore held that settlement is a condition ubsequent to allotment. If classification under the Taylor razing Act is not a prerequisite to allotment, prior settle- ent should not be required in these cases, because 43 C.F.R. 2411.1-3 designates as a trespasser anyone who makes an un- uthorized settlement on public domain covered by Executive rder 6910. (See also Application for Indian Allotment, uestion 10.) Moreover, Kenneth and Kristopher Kale indi- ated in applications R-06186 and R-06187 that they had ettled on the parcels sought.

ommunal systems of land ownership. (Squire v. Capoeman, 351 .S. 1, 9, 100 L.Ed. 883, 890 (1956); Big Eagle v. United tates, 300 F.2d 765, 769-771 (Ct.Cls. 1962); Hollister v. nited States, 145 Fed. 773, 776 (8th Cir. 1906); 19 Ops. Att'y. eneral 232, 233 (1889).) The Act sought to achieve these bjectives by giving each Indian citizenship and a parcel of and to be used for a home and for agricultural or grazing arposes on agricultural or grazing land. (25 U.S.C. §331.)

Under the rule requiring legislation to be onstrued in the way most favorable to Indians (Alaska Pacific isheries v. United States, supra, Choate v. Trapp, supra; nited States v. Celestine, supra; Arenas v. Preston, supra; g Eagle v. United States, supra), the Interior Department hould construe the Allotment Act in a way that will allow he broadest range of crop and stock raising. Yet the Depart- ent has defined "grazing land" (25 U.S.C. §331) as land hich "can not be profitably devoted to any agricultural use ther than grazing" (43 C.F.R. §2212.0-7(a)(2) [emphasis dded]) and has thus precluded an Indian from obtaining a 160 re allotment for poultry, hog, or feed lot cattle raising. he Government's position is that native grasses and forage re the only feeds that may be considered in determining hether an Indian can profitably engage in the "agricultural" 43 C.F.R. §2212.0-7(a)(2)) pursuit of raising animals on razing land. (See John E. Balmer, 71 I.D. 66, 67 (1964); etter from Derrel S. Fulwider to James Mitchell re R-05789, ecember 30, 1964.)

Neither hogs (Anderson & Kiser, Introductory

nimal Husbandry 368-369 (1963); Acker, Animal Science 72-77, 79 (1963)) nor poultry (Ibid.; Wilson, Poultry Production, Scientific American, July, 1966, p. 58-59) are grazing animals, and many California cattlemen raise none of their own feed (Hopkin & Kramer, Cattle Feeding in California 7 (1965)). Indians were raising turkeys before the white man came to America (Wilson, Poultry Production, supra, at p. 57), and Congress considered Indian hog raising while discussing the desirability of Indian allotments (Congressional Record for January 20, 1881 at 787). Under the rule of construction favoring Indians, "grazing land" should include any land unfit for cultivation (Congressional Record for December 15, 1886 at 192) not just land with enough native plants for an Indian to profitably graze sheep and cattle. Surely the Government would not argue that on forty or eighty acre allotments of agricultural land a farmer would have to rely exclusively on the land's natural resources and could not buy seed, fertilizer, or tractors. Why then should an Indian raising poultry, hogs, or cows not be entitled to rely on purchased corn, potatoes, or peletized feed to maintain a profitable enterprise?[5]

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5. This analysis is independent of the Taylor Grazing Act. If land were more valuable for raising poultry, or hogs, or feed-lot cattle than for grazing, the land could be classified as available for Indian allotments even though the land was classified as grazing land under the General Allotment Act.

IV "UNSUITABLE FOR AN INDIAN ALLOTMENT" IS NOT A PROPER LAND CLASSIFICATION UNDER THE TAYLOR GRAZING ACT.

One basis given for rejecting all of the pplications except R-06410 through R-06416 was that the ands were classified under the Taylor Grazing Act as unsuitble for Indian allotments. Even assuming that the Taylor razing Act modified the Indian Allotment Act, such a classfication is not proper.

When a person applies to have land classified nder the Taylor Grazing Act, the Secretary of the Interior as a mandatory duty to classify the land for its highest se, i.e., the use for which it is most valuable or suitable. 43 U.S.C.§§315, 315f; Richardson v. Udall, supra, 253 F.Supp. at 9 (Idaho 1966).) A classification of unsuitable for an ndian allotment does not indicate in any way what a parcel s most valuable or suitable for.[6]

. According to the Field Examiner's report on application -05789, the sought-after land had been previously classified s proper for title transfer by exchange or sale in order to lock up federal ownership in areas of more concentrated ederal holdings. This does not affect the point made in the ext. First, the classification decision did not rely on the revious classification. Second, while the Secretary can xchange public domain for private lands, (43. U.S.C. §315g), r classify lands for disposal because they would have a igher use if not federally owned (43 U.S.C. §1411), the ecretary can not prevent claims on federal land by classify-

V LAND IS NOT APPROPRIATED WITHIN THE MEANING OF 25 U.S.C. §334 WHEN IT IS ORDERED INTO THE MARKET FOR SALE PURSUANT TO THE ISOLATED TRACT ACT (43 U.S.C. §1171).

The BLM rejected applications R-06410 through -06416 on the ground that the land in question was appropriated" (25 U.S.C. §334) when it was ordered into the arket for sale at auction under the Isolated Tract Act. hose decisions must be reversed because they unreasonably gnored the rule requiring statutory constructions favoring ndians. The word appropriated has several meanings when sed in connection with the disposal of government land. ppropriated usually means set apart for some particular urpose. (Wilcox v. Jackson ex den. McConnel, 38 U.S. 498, 12, 10 L.Ed. 264, 271 (1839).) Sometimes appropriated means

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ng the land for disposal where the classification says othing about how the land will be used once it is out of ederal control. (Richardson v. Udall, supra, at 79.) A arcel's most valuable use is not determined by whether the overnment will be paid for the land. (Ibid.)

In other cases (e.g., R-05504), the BLM wrote the applicant's letters stating that the best use of the land was for omesites, but classified the land as not capable of serving he purposes of 25 U.S.C. §334. A classification of proper or disposal as homesites would have been proper. (43 U.S.C. 1411.)

old, allotted, or entered. (43 U.S.C. §148.) Occasionally ppropriated means reserved. (Contra, 43 U.S.C. §315; United tates v. Fitzgerald, 40 U.S. 407, 10 L.Ed. 785 (1841); eople v. Commissioner of the State Land Office, 23 Mich. 269 1871).) Only the Interior Department asserts that United tates lands are appropriated when the government has only ffered to sell them to anyone, for any purpose, at a public uction.

The Government supports its interpretation by itation to two cases and a regulation. The cases, Ferry v. dall, 336 F.2d 706 (9th Cir. 1964) cert. den. 381 U.S. 904, nd Lewis v. Udall, 374 F.2d 180 (9th Cir. 1967) do not iscuss whether an offer to sell under 43 U.S.C. §1171 appro- riates land under 25 U.S.C. §334 or any other law. In fact, hose cases hold that the Government can refuse to sell to the igh bidder at an isolated tract auction.

The regulation, 43 C.F.R. §2243.1-6, provides hat lands offered for sale under the Isolated Tract Act are egregated from appropriation under the public land laws. he Government maintains that segregation under section 243.1-6 constitutes an appropriation within the meaning of he General Allotment Act (Appellees Brief at 26, fn. 8), ut such a construction of "appropriated" is inconsistent ith the construction of statutes affecting Indians. The egulation is therefore void as applied. (Cf. Government f Guam v. Koster, 362 F.2d 248, 252 (9th Cir. 1966); mith v. Commissioner of Internal Revenue, 332 F.2d 671, 673 9th Cir. 1964); Greene v. Deitz, 247 F.2d 689, 692-693

2d Cir. 1957).)[7]

VI SEVEN INDIANS WHO DID NOT PURSUE ADMINISTRATIVE APPEALS ARE NEVERTHELESS ENTITLED TO JUDICIAL REVIEW OF THE INTERIOR DEPARTMENT'S DECISIONS, BECAUSE ADMINISTRATIVE APPEALS COULD HAVE CAUSED THEM IRREPARABLE HARM AND 43 C.F.R. §2243.1-6, WHOSE LEGALITY THE INDIANS CHALLENGE, WOULD HAVE RENDERED THE APPEALS FUTILE.

Applications R-06410 through R-06416 were rejected ecause the land sought had been ordered into the market for ale under the Isolated Tract Act. Administrative appeals rom the BLM field office decisions would have been futile. he Interior Department would necessarily have followed its wn regulation, 43 C.F.R. §2243.1-6, and affirmed the initial ecisions. Appeals could also have been irreparably damaging; hile the appeals were pending, the Government could have uctioned off the land. The Indians therefore filed a lawsuit o enjoin any sale and for declaratory relief.

As the marketing order's effect is solely a uestion of law, and administrative appeals would have been utile and could have caused irreparable harm, administrative ppeals were not a prerequisite to judicial review. (Wolff v.

. 43 U.S.C. §1171 provides "this section shall not defeat ny valid right which has already attached under any pending ntry or location." This does not require an implication that o right may attach after land has been ordered into the market ut not sold. Since such an implication would effect a artial sub silentio repeal of the Allotment Act and since ub silentio repeals are disfavored (see p. 12, supra), no uch implication should be made.